

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD WHITEHURST,

Plaintiff,

No. C 10-4195 PJH

v.

ORDER

ALL WALGREEN'S COMPANY
STORES, et al.,

Defendants.

The court is in receipt of a reply brief filed by defendants in support of their motion to dismiss the complaint in the above-entitled action. Defendants filed their motion on October 18, 2010, and noticed it for hearing on December 1, 2010. On November 8, 2010, two days before his opposition was due, plaintiff filed a first amended complaint ("FAC") in lieu of an opposition. Plaintiff was entitled to do this under Federal Rule of Civil Procedure 15 (a)(1), as November 8, 2010 was 21 days after service of defendant's motion. Defendants contend that while the FAC moots a portion of defendants' motion, it is still "clearly subject to some of the same challenges raised in [d]efendants' [m]otion." Thus, defendants want to proceed with the hearing on December 1, 2010.

The court declines to do so, particularly given that it has received no opposition from plaintiff. While defendants may be convinced of the correctness of their position, the court is nonetheless required to provide plaintiff with an opportunity to respond to defendants' arguments, and must also consider whatever it is that plaintiff wishes to say. Because defendants' arguments regarding the amended complaint are contained in their reply brief,

1 plaintiff would have no opportunity to respond prior to the hearing.

2 Accordingly, the court prefers that defendants withdraw the motion to dismiss the
3 original complaint, and (if they wish) file a motion to dismiss the amended complaint,
4 noticed in accordance with the local rules of this court.

5 The date for the hearing on defendants' motion to dismiss the original complaint is
6 hereby VACATED.

7
8 **IT IS SO ORDERED.**

9 Dated: November 16, 2010



PHYLLIS J. HAMILTON
United States District Judge